* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ R.S.A. No.105/2002

% Date of Decision : 7th of September, 2007

\# MR. S.K. SHARMA .....Appellant
! Through : Mr. Suresh Sharma,Adv.

versus

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MR. K. DAS KAVANAL .....Respondent
^ Through : Mr. Kishore M. Gajaria, Adv.

* CORAM:
HON'BLE MR. JUSTICE B.N. CHATURVEDI

1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

: **B.N.CHATURVEDI, J.**

1. The appellant is in second appeal against a judgment/order dated 4th May, 2002 of learned Addl.

District Judge dismissing his appeal being barred by limitation.

2. The respondent had filed a suit for recovery of Rs.47,600/- against the appellant which was decreed by the court of Civil Judge. The appellant filed an appeal against the same. To the memo of appeal instead of certified copies of the judgment and decree, only photocopies thereof were annexed. Later, on realizing the mistake the appellant sought to place on record certified copies of impugned judgment and decree which was contested by the respondent on the plea that since the appeal had been filed without annexing thereto certified copies of impugned judgment and decree, the appeal was not maintainable and also that the same was otherwise barred by limitation. The learned Addl. District Judge holding that since neither any application for condonation of delay was filed nor an application

seeking exemption from filing certified copies of the impugned judgment and decree had been made, the appeal was liable to be dismissed being beyond the period of limitation and accordingly dismissed the same.

3. I have heard the learned counsel from either side.

4. The argument of the learned counsel for the appellant was that even if the appeal was barred by limitation and the memo of appeal was not accompanied by an application for condonation of delay, the learned Addl. District Judge should have, instead of proceeding to dismiss the appeal as being barred by limitation, required the appellant to make appropriate application for condonation of delay. He in support of his arguments in this regard referred to INSTRUCTIONS TO CIVIL COURTS IN DELHI [Vol. I of High Court Rules and Orders] pertaining to civil

appeals and revisions and two decisions of Punjab and Haryana High Court in Rakesh Raj etc. vs. Kewal Kumar etc.; **Vol. 178 The Punjab Law Reporter [Vol. LXXXVI-1984]** and M/s Vishwas Trading Corporation, Ludhiana vs. M/s M.K.C. Industries, Ludhiana; **451 The Punjab Law Reporter [LXXXVI-1984]** as also a Supreme Court decision in State (M.P.) vs. Pradeep Kumar; **2000 Rajdhani Law Reporter 539 (SC)**.

5. On the contrary from the side of respondent a reference was made to decisions in Union of India vs. M.M. Anand & Ors.; **AIR 1988 Delhi 271** and Delhi Development Authority Vs. Smt. Sushil Kaur & Anr.; **AIR 1997 Delhi 104**, Rampravesh Singh & Ors. Vs. Mahesh Singh & Ors.; **AIR 1961 Patna 129** and State of J & K & Ors. Vs. Gh. Nabi War; **AIR 1997 Jammu & Kashmir 24** to stress the point that where the memo of appeal is not accompanied by certified

copies of judgment and decree appealed from and the same are placed on record after expiry of the period of limitation prescribed for appeal, the appeal would be time barred.

6. In the wake of issue raised for consideration, in the backdrop of the facts of the case, following substantial question of law is formulated for determination :

> Q. : Whether an appeal filed without certified copies of judgment and decree appealed from and without an application for condonation of delay accompanying the memo of appeal, would be liable to outright dismissal as barred by limitation without requiring the appellant to remedy the defect ?

7. Order XLI Rule 1 of the Code of Civil Procedure provides that an appeal is to be preferred in the form of a memorandum signed by the appellant or his

agent. The memo of appeal was prior to 1st July, 2002 required to be accompanied by a copy of the decree appealed from and (unless the appellate court dispenses therewith) of the judgment on which it is founded. By way of Code of Civil Procedure (Amendment) Act, 1999 w.e.f. 1st July, 2002 now the memo of appeal is to be accompanied only by a copy of the judgment appealed from. There can be no two opinions on legal proposition that a memo of appeal is to be accompanied by certified copies of judgment and decree or copy of judgment appealed from, as the case may be and where the memo of appeal is unaccompanied thereby, the same would not be a valid presentation. Similarly, where an appeal is filed beyond the period of limitation without an application for condonation of delay accompanying the same, it would be a case of curable defect and the deficiency could be required to be removed by directing the

appellant to make an appropriate application explaining the delay in filing the appeal.

8. INSTRUCTIONS TO CIVIL COURTS IN DELHI [Vol. I of High Court Rules and Orders] prescribing procedure in the case of appeals and applications presented after period of limitation provide thus :

> "5. **Appellant required on explain for delay** – In such cases if the appellant has not tendered, with the memorandum of appeal, any explanation of the delay in presenting it, the Court shall, if the appellant is present in person or by agent, record an order thereon, or to be annexed thereto, requiring the appellant to supply such explanation in writing, and to represent such appeal within a period to be specified in the order. Such period may be enlarged in the discretion of the Court, either before or after it has expired, upon sufficient cause for such enlargement being shown to the satisfaction of the Court.
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> 6. **Examination of appellant** – When the memorandum of appeal is represented with the explanation required or when the memorandum of appeal as first presented contains an explanation of the delay in presenting it, the Court shall take into consideration the explanation offered, and

may examine the appellant or his agent, in order to elucidate the explanation.

7. **Court may dismiss appeal as barred by time** – If the Court is of opinion that assuming all the facts stated by way of explanation to be true, the explanation is (in)sufficient, the Court shall record an order to that effect, and shall reject the appeal as barred by time....."

9. Apart from above quoted instructions on the subject, the decision of the Supreme Court in Pradeep Kumar's case (supra) clearly lays down that where the appeal is filed late ordinarily it must be accompanied by an application for condonation of delay. If the memo of appeal is not accompanied by such an application, the same may be returned for amendment as it would not be a valid presentation. It may then be open to the appellant to file an application for condonation of delay and remove the defect. On Rule 3A Order XLI CPC it was laid down that "the rule cannot be interpreted very harshly and make the non-compliance punitive to appellant. It

was observed that an unintentional lapse on the part of litigant should not normally cause the doors of the judicature permanently closed before him".

10. In the present case when the appeal was initially filed only photocopies of the impugned judgment and decree were annexed to the memo of appeal which could, of course, be not treated as a valid presentation of the appeal. Certified copies of the impugned judgment and decree were sought to be placed on record at a much later stage by which time the period of limitation for appeal had already expired. No application for condonation of delay was filed while seeking to place the certified copies of the impugned judgment and decree on record at such later stage. The memo of appeal initially filed without certified copies of impugned judgment and decree was, as a matter of course, liable to be returned to the appellant being not a valid presentation. This was

however not done. The question of limitation came to be raised by the respondent for consideration only when the appellant sought to bring on record certified copies of impugned judgment and decree in place of photo copies thereof filed initially with the memo of appeal. In view of obvious delay in filing the certified copies of the impugned judgment and decree, the appellant was required to be asked to explain the delay in writing. The learned Addl. District Judge however instead of either returning the memo of appeal to the appellant being not validly presented or requiring him to make an application in writing explaining the delay in seeking to place on record the certified copies of the impugned judgment and decree, proceeded to dispose of the appeal as being barred by limitation on the basis of whatever was available on record as also the oral submissions made from either side. This was clearly not the advisable course as set

out in the Instructions to Civil Courts on civil appeals and revisions. The proper course for the learned Court below was to have granted time to the appellant to enable him to make appropriate application explaining delay, if any, in filing the appeal and/or omission on his part in filing the certified copies of the impugned judgment and decree with the memo of appeal and for applying to place the same on record at a belated stage when the period of limitation for appeal had expired much earlier.

11. The appeal is, in the circumstances, allowed and the impugned judgment/order dated 4th May, 2002 dismissing the appeal as time barred is set aside. The case is remanded to the concerned court of learned Addl. District Judge with a direction to grant reasonable time to the appellant to file appropriate application in writing to explain delay and on such an application being made to hear and decide the same in accordance with law.

12. The question of law is answered as aforesaid.

(B.N.CHATURVEDI)
September 7, 2007 JUDGE
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